IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1334

DONALD BORDENKIRCHER, Superintendent,
Kentucky State Penitentiary,

Petitioner,

v.

PAUL LEWIS HAYES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC
DEFENDER
625 Leawood Drive
Frankfort, Kentucky 40601

Attorney for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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STATEMENT OF QUESTION PRESENTED

WHETHER THE COMMONWEALTH'S ATTORNEY IS PROHIBITED FROM BARGAINING FOR A PLEA OF GUILTY BY THREATENING TO BRING AN ADDITIONAL INDICTMENT IF AN ACCUSED DOES NOT ACCEPT A PLEA BARGAIN OFFER.

COUNTERSTATEMENT OF THE CASE

The facts that are relevant to the legal issues in this case are clearly and completely delineated in the opinion of the United States Court of Appeals for the Sixth Circuit. *Hayes v. Cowan*, 547 F.2d 42 (6th Cir. 1976); (Appendix, hereinafter designated App., pp. 83-89). As the circuit court below indicated, "[t]he facts which led to [Hayes'] conviction and incarceration are not disputed." *Id.* at 43.

On January 8, 1973 Paul Lewis Hayes, the respondent, was indicted by the Fayette Circuit Court Grand Jury in Lexington, Kentucky for the offense of uttering a forged instrument (App., pp. 7-8).

According to the indictment, Mr. Hayes on or about November 20, 1972 "uttered a forged instrument, a check drawn on the account of Brown Machine Works in the amount of $88.30" in violation of Kentucky Revised Statute (KRS) 434.130 (App., p. 8).[1] After arraignment, pretrial conferences were held with the state prosecutor on January 24 and 26, 1973 (App., pp. 9, 10-11). During these conferences the prosecutor offered to recommend a five-year sentence if Mr. Hayes would plead guilty.[2]

Mr. Hayes was warned that if he did not plead guilty, he would be reindicted under Kentucky's habitual offender statute, KRS

[1]KRS 434.130 authorized that upon conviction of this offense the individual "shall be confined in the penitentiary for not less than two nor more than ten years."

[2]Hayes may well have been skeptical of the advantages of securing the prosecutor's recommendation on sentence. In Kentucky the sentencing judge is not bound by the prosecutor's sentence recommendation reached as a result of a plea negotiation. Even though the judge rejects the prosecutor's recommendation on sentence, the defendant is not entitled to withdraw his guilty plea. *Couch v. Commonwealth*, Ky., 528 S.W.2d 712 (1975).

431.190, and face the possibility of a mandatory life sentence.[3]

These facts were admitted by the prosecutor during his cross-examination of Mr. Hayes at the habitual offender portion of the trial:

> . . . isn't it a fact that I told you if you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions? (App., pp. 49-50).

Mr. Hayes refused to plead guilty and, instead, insisted on receiving a full trial. As a result of Mr. Hayes' refusal to accept his offer and plead guilty, the prosecutor returned to the grand jury, and, on January 29, 1973, obtained a new indictment charging Mr. Hayes under the habitual criminal statute with the forgery charge as the third offense (App., pp. 12-13).

Mr. Hayes was convicted by a jury, and on the instructions of the judge, the mandatory life sentence for a third offense habitual criminal was imposed (App., pp. 21-26).

The remaining facts and procedural history are adequately stated in petitioner's Statement of the Case (Petitioner's Brief, hereinafter Brief, pp. 2-5).

[3]At the time of Mr. Hayes' conviction, KRS 431.190 provided:

> Conviction of felony; punishment on second and third offenses. Any person convicted a second time of felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state.

KRS 431.190 has since been repealed. According to KRS 532.080, which now regulates "persistent felony offender sentencing," the special sentence may be imposed only if, for each of two previous felony convictions, the sentence was at least one year; defendant was imprisoned under each such sentence before commission of the instant felony; and the offender was over eighteen years of age at the time he committed each offense. Petitioner would not have been subjected to enhanced sentencing under KRS 532.080, because none of these conditions were satisfied. *Hayes v. Cowan, supra* at 42.

SUMMARY OF ARGUMENT

A defendant charged with a criminal offense is entitled to exercise his constitutional rights without apprehension that the prosecutor will retaliate by reindicting him on a more serious charge with a significantly increased potential period of confinement. Due process guarantees no less.

The potential for impermissible vindictiveness exists when a prosecutor is allowed to bring an enhanced indictment against a defendant who has refused to plead guilty to the unenhanced charge in exchange for the State's offer of leniency. Due process was offended by placing Mr. Hayes in fear of retaliatory action for insisting upon his right to plead not guilty. Consequently, Mr. Hayes' conviction as an habitual offender must be vacated because it is the product of the prosecutor's constitutionally impermissible retaliatory act.

Because a prosecutor has both the motive and means to discourage not guilty pleas, the potential for vindictiveness inherent in the prosecution's charging power requires a prophylactic rule that prohibits the prosecutor from responding to an invocation of a procedural right with a new indictment charging a more serious offense.

Whether tested by a prophylactic rule of "potential vindictivenes" or by the standard of actual vindictiveness, the prosecutor's threat to reindict Mr. Hayes if he refused to plead guilty constituted impermissible vindictiveness and a denial of due process.

Even though a prosecutor is constitutionally permitted to negotiate with a defendant to encourage a guilty plea, his threat to reindict on a more serious charge unless an accused agrees to plead guilty is no less vindictive or retaliatory because it occurs in the context of plea bargaining.

A legitimate system of plea bargaining presupposes fairness in securing agreement between an accused and a prosecutor. The mutuality of advantage, not the fear of retaliatory action by the prosecutor, must be the cornerstone of any acceptable plea bargaining structure.

Accordingly, the decision of the circuit court below to apply constitutional safeguards to the prosecutor's admittedly vindictive and retaliatory reindictment of Mr. Hayes following the breakdown of plea negotiations is in complete conformity with this Court's past decisions and serves to insure the integrity of the plea bargaining process as well as the free exercise of constitutional rights.

ARGUMENT

THE COMMONWEALTH'S ATTORNEY IS PROHIBITED FROM BARGAINING FOR A PLEA OF GUILTY BY THREATENING TO BRING AN ADDITIONAL INDICTMENT IF AN ACCUSED REJECTS A PLEA BARGAIN OFFER.

A. THE PROSECUTOR'S THREAT TO REINDICT RESPONDENT ON A MORE SERIOUS CHARGE IF RESPONDENT EXERCISED HIS CONSTITUTIONAL RIGHT TO PLEAD NOT GUILTY WAS IMPERMISSIBLY VINDICTIVE AND VIOLATIVE OF DUE PROCESS.

Due process of law guarantees that a person charged with a criminal offense "is entitled to pursue" his constitutional rights to plead not guilty and to have a jury trial, "without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration." *Blackledge v. Perry*, 417 U.S. 21, 28 (1974), citing *United States v. Jackson*, 390 U.S. 570 (1968).

At every stage of the proceedings, in both state and federal courts, all parties have acknowledged that Paul Lewis Hayes, the respondent, was reindicted and tried as an habitual offender simply because he refused to submit to the prosecutor's threat that such a reindictment would occur unless respondent agreed to plead guilty and to accept the prosecutor's promised sentence

recommendation.

This Court should note that in his Statement of the Case petitioner candidly concedes that the respondent's "refusal to plead guilty [to the unenhanced forgery indictment] clearly lead [sic] to his indictment under the habitual criminal statute" (Brief, p. 4).

Prior to participating in pretrial conferences with the prosecutor, Mr. Hayes faced an unenhanced charge of uttering a forged instrument with a maximum penalty of confinement for ten years. After declining to capitulate to the prosecutor's threat of reindictment, Mr. Hayes found himself facing a mandatory life sentence if convicted as an habitual criminal.

This Court has previously held that defendants in criminal cases who assert procedural rights must be treated in a manner that avoids any suggestion of vindictive or retaliatory motive. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), this Court examined the issue of whether a trial court can impose a more severe sentence upon retrial and reconviction after an accused has successfully challenged his first conviction on appeal. This Court held that, although more severe sentences are not absolutely prohibited, due process requires that the reasons for imposing such sentences upon retrial must affirmatively appear so that an accused may be free, when taking an appeal, of any apprehension of subsequently retaliatory or vindictive sentencing because of his successful appeal. *Id.* at 725-26.

In *Blackledge, supra*, this Court extended the rule in *Pearce* to protect the accused against the apprehension of prosecutorial vindictiveness. Perry, the accused in *Blackledge*, was initially charged with a misdemeanor assault with a deadly weapon for an altercation with another inmate which occurred while Perry was incarcerated in prison. After he was convicted in an inferior court in North Carolina and given a sentence of six months confinement, Perry chose to exercise his right under North Carolina law to a trial *de novo* in the Superior Court. Prior to the inception of the trial *de novo*, the prosecution obtained an indictment charging Perry with a felony for the same acts for which he had previously been charged with a misdemeanor. The net result was an increase

of eleven months in Perry's sentence.

Noting that prosecutors have a "considerable stake" in discouraging new trials, this Court observed that "if the prosecutor has the means readily at hand to discourage such appeals by 'upping the ante' . . . the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial." *Id.* at 27-28. Consequently, this Court held "that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo*." *Id.* at 28-29.

This Court in *Blackledge* reasoned that when the circumstances "pose a realistic likelihood of 'vindictiveness' . . . due process of law requires a rule analogous to that of the *Pearce* case." *Id.* at 27.

Pearce and *Blackledge* therefore establish that when the prosecution has occasion to reindict the accused because the accused has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges was not attributable to a vindictive motive. *United States v. Ruesga-Martinez*, 534 F.2d 1367, 1369 (9th Cir. 1976).

According to the circuit court in the case *sub judice*, "[t]he concerns expressed in *Blackledge* have persuaded several lower courts to limit the prosecutor's discretion in related situations." *Hayes v. Cowan, supra* at 44, citing *United States v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974); *United States v. Ruesga-Martinez, supra*; *United States v. Butler*, 414 F. Supp. 394 (D. Conn. 1976); *Sefcheck v. Brewer*, 301 F. Supp. 793 (S.D. Iowa 1969).

Following the constitutional principles enunciated by this Court in *Pearce* and *Blackledge*, both *supra*, as well as their application by lower federal courts in comparable factual situations, the circuit court in the instant case held "that a similar potential for impermissible vindictiveness exists when a prosecutor is allowed to bring an habitual offender indictment against a defendant who has refused to plead guilty to an indictment for the same

unenhanced substantive offense."[4] *Hayes v. Cowan, supra* at 44. The circuit court below concluded that "due process" was "offended by placing [Hayes] in fear of retaliatory action for insisting upon his constitutional right to stand trial" and ruled that Hayes' enhanced punishment as an habitual offender must be vacated as the product of an unconstitutional action by the prosecutor. *Id.* at 45.

As in *Blackledge, supra,* "[t]he question is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case." *Blackledge v. Perry, supra* at 27. In the case at bar, as in *Blackledge,* "the central figure is not the judge or the jury, but the prosecutor." *Id.*

For a time it was uncertain whether due process required that criminal defendants be shielded from the danger of prosecutorial vindictiveness and specifically from increases in the offense charged. In *Chaffin v. Stynchcombe,* 412 U.S. 17 (1973), this Court suggested that prosecutorial vindictiveness was not to be feared, at least insofar as it might bring about an increased sentence at a jury trial through an increased sentence recommendation. *Id.* at 27 n. 13. However, because there existed a "realistic likelihood of 'vindictiveness'" on the part of the prosecutor, this Court in *Blackledge, supra,* made the rule of *Pearce* fully applicable to the prosecutor as well as the sentencing authority. *United States v. Jamison, supra* at 415.

In prior decisions, this Court has developed criteria for assessing whether the "possibility of vindictiveness" inheres in a situation. For example, in *Chaffin v. Stynchcombe, supra,* this Court concluded that "there is no real basis for holding that jury resentencing poses any real threat of vindictiveness." *Id.* at 28. To arrive at this determination, this Court noted that "[t]he first prerequisite for the imposition of a retaliatory penalty is knowledge of the prior sentences" and acknowledged that

[4]The charging power of the prosecutor has been circumscribed in other contexts. *See, e.g., United States v. Falk,* 479 F.2d 616 (7th Cir. 1973); *Dixon v. District of Columbia,* 394 F.2d 966 (D.C. Cir. 1968); *MacDonald v. Musick,* 425 F.2d 373 (9th Cir. 1970).

customarily juries lack such information. *Id.* at 26. Next, it was recognized that "the jury, unlike the judge who has been reversed, will have *no personal stake* in the prior conviction and *no motivation* to engage in self-vindication." *Id.* at 27; emphasis added. In this respect, "the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals." *Id.*

The "potential for vindictiveness" was also found lacking in Kentucky's trial *de novo* court on the basis of a comparable version of these criteria. *Colten v. Commonwealth of Kentucky,* 407 U.S. 104 (1972).

However, when this Court analyzed "the opportunities for vindictiveness" in the *Blackledge* case, factors such as the prosecutor's "knowledge," "personal stake," "motivation," and "sensitivity to institutional interests," impelled the conclusion that "a potential for vindictiveness" existed in the ability of the prosecutor to substitute a more serious charge for the original one when a convicted defendant pursued his statutory right to a trial *de novo.*

As in *Blackledge,* "[a] prosecutor clearly has a considerable stake in discouraging" accused individuals from exercising their constitutional right to a trial by jury to determine their guilt since such a trial "will clearly require increased expenditures of prosecutorial resources" before the defendant's conviction may be achieved, and "may even result" in the defendant going free. *Blackledge v. Perry, supra* at 27.

These exact factors have been previously recognized by this Court as advantages which the State and its representative, the prosecutor, incur when the defendant enters a plea of guilty. "[W]ith the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is a substantial doubt that the State can sustain its burden of proof." *Brady v. United States,* 397 U.S. 742, 752 (1970). Indeed, "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by

many times the number of judges and court facilities." *Santobello v. New York*, 404 U.S. 257, 260 (1971). Due to the guilty plea and the often concomitant plea bargain, "[j]udges and prosecutors conserve vital and scarce resources." *Blackledge v. Allison*, ___ U.S. ___ , 97 S. Ct. 1621 (1977).

Petitioner readily admits that "[b]ecause of the desirable reasons for engaging in plea bargaining . . . prosecutors attempt to structure a criminal case so that a defendant will choose not to go to trial" (Brief, p. 12).

The realities of the criminal justice system irrefutably establish that the prosecutor with his "sensitivity to the institutional interests" which are promoted by a guilty plea has "a considerable interest in discouraging" contested jury trials. As a result of this "personal stake" in obtaining guilty pleas, the prosecutor has an apparent "motive" for vindictiveness and retaliation against a defendant who declines the prosecutor's proposed "plea bargain."

To provide empirical substantiation to the charge that prosecutors have an undeniable "motive" for discouraging pleas of not guilty, this Court need look no further than the transcript of the respondent's state trial. While cross-examining respondent during the habitual offender portion of the trial, the prosecutor admitted this motive:

> . . . isn't it a fact that I told you if you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions? (App., p. 50).

Unlike the resentencing jury in *Chaffin* and the Kentucky trial *de novo* court in *Colten*, the prosecutor does have motivation for vindictiveness when his proposed "plea bargain" is spurned by an accused.

The next focal point in assessing the "opportunities for vindictiveness" is whether the prosecutor "has the means readily at hand to discourage" pleas of not guilty — "by 'upping the ante' " through reindictment "on a more serious charge than the original one." *Blackledge v. Perry, supra* at 27-28.

As the circuit court below recognized, "[w]hen a prosecutor obtains an indictment less severe than the facts known to him at the time might permit, he makes a discretionary determination that the interests of the state are served by not seeking more serious charges." *Hayes v. Cowan, supra* at 44. Accordingly, when the prosecutor in the case *sub judice* initially obtained an unenhanced indictment for the offense of uttering a forged instrument, he made a discretionary determination that a conviction of that offense with the possibility of a maximum sentence of ten years imprisonment was all that was warranted under the circumstances.

However, since Mr. Hayes was willing to risk that maximum term of ten years incarceration on the possibility that a jury would vindicate him, the prosecutor turned to a "means readily at hand to discourage" Mr. Hayes from pleading not guilty. The prosecutor's "means" was the threat of reindictment on a more serious offense — in this case, the habitual offender statute with its mandatory life sentence.

Undoubtedly, a prosecutor's threat to reindict on a more serious offense, even before trial has commenced, is an effective means of discouraging a defendant from pleading not guilty. In the parlance of *Blackledge*, the reindictment on a more serious charge undoubtedly amounts to "upping the ante."

By employing the threat of reindictment on a more serious offense, the prosecutor "can insure that only the most hardy defendants will brave the hazards" of a trial on the merits. *Blackledge v. Perry, supra* at 28. In the instant case Mr. Hayes refused to accept the prosecutor's plea bargain, exercised his constitutional right to plead not guilty, braved the hazards of a trial on the more serious habitual offender charge, and received a sentence to life imprisonment.

Measured by the principles enunciated in *Pearce* and *Blackledge*, the prosecutorial tactic of threatening to seek a new indictment on a more serious charge to discourage a defendant from pleading not guilty is constitutionally impermissible. The ancillary theorem in such a situation requires that due process prohibit the prosecutor from following up his threat with a new

indictment on a more serious offense. *Blackledge v. Perry, supra* at 28.

Petitioner asserts that "the unconstitutional vindictiveness alleged to exist in the plea bargaining practice [at bar] . . . pales when a comparison is made to plea bargaining practices such as offering to amend a felony count to a misdemeanor, but upon rejection of the offer, seeking at trial the maximum penalty permitted for the felony offense" (Brief, p. 22).

In an endeavor to mitigate the vindictiveness of the tactic employed by the prosecutor in the case at bar, petitioner has characterized "[t]he whole practice of plea bargaining" as "coercive" (Brief, p. 22). This characterization by petitioner appears to be a pejorative paraphrase of this Court's observation in *Brady v. United States, supra* at 750, that "[t]he State to some degree encourages pleas of guilty at every important step in the criminal process." Certainly, petitioner misconceives the fundamental distinction between the prosecution's offer of concessions or promises of leniency to influence or encourage a guilty plea and the prosecution's threat to seek a more severe charge to "discourage" the exercise of the constitutional right to plead not guilty.[5]

Indeed, this Court in *Brady, supra*, declined to hold that a guilty plea is unconstitutional simply because it is "motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law *for the crime charged.*" *Id.* at 751 (emphasis added). However, this Court refused to extend its approval "to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty." *Id.* at 751 n.8.

[5]There is a marked contrast between encouraging and inducing a defendant to plead guilty. The word "encourage" means "to stimulate by assistance, approval, etc." *The Random House Dictionary of the English Language, The Unabridged Edition*, Random House, New York (1969). "Induce," on the other hand, means "to lead or move by persuasion or influence, as to some action, state of mind, etc." *Id.*

Whatever might be said of the prosecutor's charging discretion and bargaining prerogatives, "they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." *United States v. Jackson, supra* at 582. Both *Pearce* and *Blackledge* acknowledge that the foregoing constitutional principle excerpted from *Jackson* is the lodestar of the prophylactic rule they enunciate.

Respondent readily admits that "*Jackson* did not hold . . . that the Constitution forbids every government imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." *Chaffin v. Stynchcombe, supra* at 30. For instance, "the decision by a defendant at the close of the state's evidence at trial that he must take the stand or face certain conviction" is not improperly compelled because of "the State's responsibility for some of the factors" which discourage his exercise of his Fifth Amendment right to remain silent. *Brady v. United States, supra* at 750.

Nevertheless, "[b]ecause the legitimate goal of" the disposition of criminal charges by agreement between the prosecutor and the accused "could be achieved without penalizing those defendants who plead not guilty and elect a jury trial," the prosecutorial tactic of threatening to reindict on a more serious charge unless the accused pleads guilty to the original charge " 'needlessly penalize[d] the assertion of a constitutional right.' " *Id.* at 746. Such a prosecutorial ploy is, therefore, unconstitutional.[6]

Despite petitioner's argument to the contrary, "[t]he day our Constitution permits prosecutors to deter defendants from exercising any and all of their guaranteed rights by threatening them with new charges fortunately has not yet arrived." *United States v. DeMarco*, 401 F. Supp. 505, 510 (C.D. Cal. 1975), *aff'd* 550 F.2d 1224 (9th Cir. 1977).

[6]As this Court noted in *United States v. Jackson, supra* at 583:
"For the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right."

Even though in *Blackledge* there was "no evidence that the prosecutor . . . acted in bad faith or maliciously in seeking a felony indictment," that factor was not deemed dispositive since the *Pearce* decision "was not grounded upon the proposition that actual retaliatory motivation must inevitably exist." *Blackledge v. Perry, supra* at 28.

Applying the principles of *Pearce*, this Court in *Blackledge* emphasized that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise" of his rights, "due process also requires that a defendant be freed of apprehension of such a retaliatory motivation." *Id.*

To insure that "a potential for vindictiveness" would not deter any convicted defendant from exercising his right to a trial *de novo*, this Court announced the prophylactic rule that "it was not constitutionally permissible for the State to respond to . . . [a defendant's] invocation of his right to appeal by bringing a more serious charge against him prior to the trial *de novo*." *Id.* at 28-29.

Blackledge and *Pearce* each establish a prophylactic rule imposing limits upon prosecutorial discretion in seeking new indictments or in conducting retrials when such actions carry with them the opportunity of retaliation for a defendant's exercise of a right that has due process implications. *United States v. DeMarco, supra*, 550 F.2d at 1227.

Pearce and *Blackledge* mandate that when the prosecution has occasion to reindict the accused because he has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges was not motivated by vindictiveness. *United States v. Ruesga-Martinez, supra* at 1369.

It is irrelevant that a particular defendant exercises his procedural rights, despite his fear of vindictiveness and despite the lack of vindictiveness in fact in subsequent proceedings instituted by the prosecutor. The prophylactic rule of *Blackledge* and *Pearce* is designed not only to relieve the defendant who has asserted his right from bearing the burden for "upping the ante" but also to prevent chilling the exercise of such rights by other

defendants who must make their choices under similar circumstances. *United States v. DeMarco, supra*, 550 F.2d at 1227.

Applying the prophylactic rule of *Blackledge* and *Pearce* to the case *sub judice*, the circuit court below reasoned that "if after plea negotiations fail, he [the prosecutor] then procures an indictment charging a more serious crime, a strong inference is created that the only reason for the more serious charges is vindictiveness." *Hayes v. Cowan, supra* at 44-45. Under such circumstances, "the prosecutor should be required to justify his action." *Id.*

Accordingly, under the prophylactic rule of *Blackledge* "due process has been offended by placing [respondent] in fear of retaliatory action for insisting upon his constitutional right to stand trial." *Hayes v. Cowan, supra* at 45.

Unlike the factual context of *Blackledge*, the case at bar contains irrebuttable evidence that the prosecutor's reindictment of respondent on a more serious charge was undertaken with a vindictive or retaliatory motive. Eschewing the need for a prophylactic rule in the case at bar, the circuit court below remarked, "In this case, a vindictive motive need not be inferred. The prosecutor has admitted it." *Hayes v. Cowan, supra* at 45.

Even in instances where there is no "real threat of vindictiveness," this Court has expressly noted that the Due Process Clause would be offended if the increased sentence was "otherwise shown to be a product of vindictiveness." *Chaffin v. Stynchcombe, supra* at 35.

Under both the prophylactic rule of *Blackledge* and the due process test of actual vindictiveness, the prosecutor's threat to reindict respondent on a more serious charge if respondent exercised his constitutional right to plead not guilty was impermissibly vindictive and violative of due process.

Accordingly, the decision of the circuit court in the instant case to apply the constitutional safeguards of *Pearce* and *Blackledge* to the prosecutor's admittedly vindictive and retalatory reindictment of respondent following the breakdown of plea negotiations is in complete conformity with this Court's past decisions and serves to insure the integrity of the plea

bargaining process as well as the free exercise of constitutional rights.

B. A PROSECUTOR'S THREAT TO REINDICT AN ACCUSED ON A MORE SERIOUS CHARGE UNLESS HE PLEADS GUILTY IS NO LESS VINDICTIVE OR RETALIATORY BECAUSE IT IS MADE IN THE GUISE OF PLEA BARGAINING.

In the initial portion of his argument petitioner expends time and effort to justify the prevalent practice of the "disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining.'" *Santobello v. New York, supra* at 260. Such a task is indeed unnecessary. This Court has repeatedly recognized that plea bargaining is not only constitutional, but is "an essential component of the administration of justice." *Brady v. United States, supra* at 751, 753; *Santobello v. New York, supra* at 260; *Blackledge v. Allison, supra*, 97 S. Ct. at 1627. Respondent has at no time in the proceedings below intimated a belief that plea bargaining is inherently unconstitutional. Even the circuit court below, as a prelude to its analysis of the issue at bar, recognized that "plea bargaining now plays an important role in our criminal justice system" and noted this Court's approval of this method of disposing of criminal charges. *Hayes v. Cowan, supra* at 43. The legitimacy of the practice of plea bargaining "has not been doubted." *Chaffin v. Stynchcombe, supra* at 31 n.18.

That the constitutionality of plea bargaining is beyond doubt is not the end of the inquiry, but only the beginning. "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. . . . However, all of these considerations presuppose *fairness* in securing agreement between an accused and a prosecutor." *Santobello v. New York, supra* at 261 (emphasis added).

Similarly, this Court has recognized that only if "properly administered" can the guilty plea and the often concomitant plea bargain "benefit all concerned." *Blackledge v. Allison, supra*, 97 S. Ct. at 1627. It is only when "properly administered" that plea bargaining "is to be encouraged." *Santobello v. New York, supra* at 260.

Two basic principles are easily culled from this Court's pronouncements on the subject of plea bargaining. Plea negotiations and the often resultant guilty plea must transpire in an environment of "fairness" and "proper administration." As noted by the circuit court below, this Court "has recognized . . . that there are limits to the tactics that a prosecutor may use in bargaining with defendants." *Hayes v. Cowan, supra* at 43, citing *Santobello v. New York, supra*.

Plea bargaining as a "legitimate system"contemplates "the negotiation of pleas." *Chaffin v. Stynchcombe, supra* at 31. Within the context of negotiation and agreement, "[a] promise by the prosecutor of sentence leniency or a charge reduction as a concession for a plea of guilty is a major characteristic of the negotiated plea process." D. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial*, at 29 (1966).

As this Court explained in *Brady, supra*, the practice of plea bargaining involves "the State . . . extend[ing] a benefit to a defendant who in turn extends a substantial benefit to the state."[7] *Brady v. United States, supra* at 753.

To justify the admittedly vindictive actions of the prosecutor in the instant case, petitioner has attempted to portray "plea bargaining" as an inherently coercive, vindictive and threatening procedure. Obviously, petitioner's analysis of the normal mode of plea bargaining rejects this Court's observations in *Brady*,

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[7]Undoubtedly the "greatest danger" involved in offering leniency for guilty pleas is that an innocent person might thereby be induced to plead guilty. Comment, 66 *Yale L.J.* 204, 220 (1956). Because "there is no such thing as a beneficial sentence for an innocent defendant," plea negotiations can be justified "only if the result is both to produce the needed guilty pleas and to persuade only guilty defendants to plead guilty." Comment, *32 U. Chi. L. Rev.* 167, 176, 181 (1964).

supra, that "both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law." *Id.* at 752. According to this Court, "[i]t is this mutuality of advantage that perhaps explains the fact that well over three-fourths of the criminal convictions in this country rest on pleas of guilty." *Id.* Within such an atmosphere of "mutuality of advantage," it is obvious that negotiations for a reduced sentence in exchange for a plea of guilty do not, under normal circumstances, "pose a realistic likelihood of vindictiveness." However, when the accused declines the sentence reductions offered by the prosecutor and refuses to plead guilty, a prosecutor's threat to obtain more severe charges against the defendant unless he pleads guilty is undeniably vindictive and retaliatory in motive.

It has long been recognized that "[a] guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void." *Machibroda v. United States*, 368 U.S. 487, 493 (1962). In fact, the threat to bring additional prosecutions is sufficient to render a guilty plea voidable. *Id.* "Of course, the agents of the State may not produce a plea . . . by mental coercion overbearing the will of the defendant." *Brady v. United States, supra* at 750.

Recognizing the potential for abuse in plea bargaining, the circuit court in the case at bar emphatically observed that "it is clear that the legitimate purposes of plea bargaining are not served if a prosecutor abuses his powers in order to coerce an unwilling defendant into foregoing his constitutional right to trial." *Hayes v. Cowan, supra* at 44.

Voicing disapproval of the practice employed by the prosecutor in the instant case, the circuit court below noted the findings of the President's Commission of Law Enforcement and Administration of Justice in *The Challenge of Crime in a Free Society* (1967):

> At the same time the negotiated plea of guilty can be subject to serious abuses . . . There are also real dangers that excessive rewards will be offered to induce pleas *or that prosecutors will threaten to seek a harsh sentence if the*

> *defendant does not plead guilty.* Such practices place unacceptable burdens on the defendant who legitimately insists upon his right to trial. (Emphasis supplied.) *Hayes v. Cowan, supra* at 43.

The circuit court below expressed its disagreement with petitioner's argument that "the entire concept of plea bargaining will be destroyed" if prosecutors are precluded from obtaining more severe charges against defendants who refuse to plead guilty. *Hayes v. Cowan, supra* at 44. Although acknowledging that "a prosecutor may in the course of plea negotiations offer a defendant concessions relating to prosecution under an existing indictment," the circuit court emphasized that the prosecutor "may not threaten a defendant with the consequences that more severe charges may be brought if he insists on going to trial." *Id.*

In the case at bar the "plea bargain" advanced by the prosecutor is readily severable into an *offer* and a *threat*. The *offer*, the constitutionally permissible concession or benefit extended to encourage a guilty plea, was the prosecutor's promise to recommend to the sentencing judge that Mr. Hayes be sentenced to but five years confinement, instead of the authorized maximum of ten years. The *threat*, the unconstitutional "means at hand to discourage" respondent from exercising his right to plead not guilty, was the warning that if the initial "offer" was not accepted the prosecutor would reindict Mr. Hayes as an habitual offender and thereby escalate the maximum sentence from ten years to a mandatory sentence of life imprisonment.

An analogy is found in the law of contracts. Compulsion produced by threats may be sufficient to destroy free agency and prevent the formation of a binding contract. In order that an agreement be invalid because of threats, it is necessary that the threats and circumstances be of a character to excite the reasonable apprehensions of a person of ordinary courage, and that the agreement be made under the influence of such threats. Furthermore, the threats must be tangible or direct. 17 *Am. Jur. 2d*, Contracts § 153 (1964).

It has long been acknowledged that "threats, force or other

coercion are clearly improper at all stages of the criminal justice process." Newman, *supra* at 28. For this reason, "when the government impermissibly uses its charging power as a bargaining tool . . . its power to bring new charges will be appropriately confined." *United States v. DeMarco, supra*, 401 F. Supp. at 512.

Petitioner asserts that the "unconstitutional vindictiveness" alleged to exist in the prosecutor's threat to reindict on a more serious charge "pales" when compared with other "plea bargaining practices" (Brief, p. 22). For example, petitioner cites the prosecutorial practice of "offering to amend a felony count to a misdemeanor, but upon rejection of the offer, seeking at trial the maximum penalty permitted for the felony offense" (Brief, p. 22).[8]

In petitioner's example, the maximum penalty the defendant braves when he pleads not guilty is the maximum penalty authorized by law for the felony offense. If the defendant and the prosecutor never discuss a plea bargain, the defendant by his plea of not guilty will risk, at most, the possibility that his conviction will result in the imposition of the maximum sentence authorized for the felony. If the defendant and the prosecutor negotiate but the defendant declines to plead guilty in return for the offered amendment of the felony charge to a misdemeanor, the defendant, even though he rejected the prosecutor's offer, will still risk only the maximum penalty authorized for the original felony charge.

Logic reveals that in petitioner's example there is no threat, but only an offer of leniency. When the defendant declines the prosecutor's offer, the parties are restored to their original positions with their concomitant risks. However, when Mr. Hayes declined the prosecutor's offer to exchange a plea of guilty for a five-year sentence recommendation, the prosecutor

[8]Petitioner perhaps ascribes too great an impact to the prosecutor's recommendation to the jury that a defendant should be sentenced to a maximum penalty. "Prosecutors often request [of the jury] more than they can reasonably expect to get, knowing that the jury will customarily arrive at some compromise sentence." *Chaffin v. Stynchcombe, supra* at 27 n.13.

threatened to raise Mr. Hayes' potential risk by reindicting him as an habitual offender. Mr. Hayes' refusal to barter his constitutional right to plead not guilty resulted in a substantial change in his original bargaining position — a detrimental change in which the maximum punishment he faced was inflated to life imprisonment.

The contrast between petitioner's hypothetical example and the situation at bar dramatically demonstrates the distinction between an "offered concession" and a "threat." "While threats, force or other forms of coercion are clearly improper at all stages of the criminal justice process, inducement by a promise of leniency is a common administrative practice throughout the criminal justice system." Newman, *supra* at 28.

Petitioner decries the "application of a prophylactic rule to the plea bargaining practice in this case" because the "*end result* of the procedure used by the prosecutor . . . was no more vindictive so as to impose an impermissible burden upon the assertions of trial rights" than is the situation where a prosecutor initially obtains an enhanced indictment and "then bargains for a plea of guilty to the principal charge on the promise" that the enhancement charge will be dismissed (Brief, pp. 20-21).

Petitioner's argument again misconceives the basic distinction between a concession and a threat. Furthermore, petitioner's position ignores the principle that there must be "fairness in securing agreement between an accused and a prosecutor." *Santobello v. New York, supra* at 261. Ultimately, petitioner's contention ignores the *timing* of the threat and the *nature* of the change in the case which the threat portended. The threat was timed and admittedly calculated to compel Mr. Hayes to decline to exercise his right to plead not guilty. Similarly, the nature of the threatened change in the case amounted to "upping the ante" in an effort "to discourage" Mr. Hayes from exercising his right to a contested trial on the merits.

While a prosecutor may offer to dismiss an existing enhancement charge as a concession to encourage a plea of guilty, he may not coerce a plea of guilty by threatening to reindict on a more serious charge.

Petitioner erroneously focuses on the superficial "end result" of both the "threat" and the "concession." The superficial "end result" is, of course, a plea of guilty to the unenhanced offense.

However, the actual "end result" where the prosecutor threatened to reindict on an enhanced charge is a coerced guilty plea. The actual "end result" where the prosecutor offered to reduce the enhanced indictment to an unenhanced charge is a constitutionally permissible negotiated plea of guilty.

Petitioner lastly suggests that "if Hayes would have chosen to plead guilty and have taken the five years" on the unenhanced indictment "rather than having risked facing the habitual criminal charge and the possibility of . . . life imprisonment," his guilty plea "would be found to be constitutionally permissible." (Brief, p. 23). Such a contention is hardly tenable. In view of the prosecutor's threat, the potential for vindictiveness inherent in the situation would establish that such a guilty plea would have been the product of constitutionally impermissible coercion. *Blackledge v. Perry, supra.* The defendant should never have been required to elect between the fear of the constitutionally impermissible retaliatory reindictment and the exercise of his constitutional right to plead not guilty. Certainly a guilty plea, "if induced by promises or threats which deprive it of the character of a voluntary act," is void. *Machibroda v. United States, supra* at 493.

In the final analysis, the negotiations of plea bargaining characterized by "fairness" between the accused and the prosecutor provide no justification for the prosecutor's resort to a vindictive and retaliatory threat as a means of discouraging a defendant from exercising his constitutional right to a trial on the merits.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

J. VINCENT APRILE, II
ASSISTANT DEPUTY PUBLIC DEFENDER
625 Leawood Drive
Frankfort, Kentucky 40601
Attorney for Respondent